Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability company, Plaintiff, v. INSURANCE ONLY, INC.; MICHAEL WEDEKING, and his marital community; PATRICK WEDEKING, and his marital community, Defendants.	NO. CV06-1210TSZ **DECLARATION OF CHERYL R.G. ADAMSON IN SUPPORT OF DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF**

CHERYL R.G. ADAMSON declares and states as follows:

I am one of the attorneys for Defendants. The following is based on my personal knowledge, and I am competent to testify thereto.

Omni has refused requests that it cull the e-mails and provide only those that it truly believes were sent by Insurance Only. Instead, based on my knowledge and experience, Omni's pattern is to send volumes of e-mails from

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a multitude of senders and leave it to the defendants to sort through each and every one of them.

Attached hereto as Exhibit 1 is a true and correct copy of the Order filed in *James S. Gordon Jr., et al. vs. Virtumundo, Inc., et al.*, United States District Court, Western District of Washington at Seattle Case No. CV06-0204JCC, on October 26, 2006.

Attached hereto as Exhibit 2 is a true and correct copy of Plaintiffs' Motion for Partial Summary Judgment Permanently Enjoining Defendants from Sending Commercial Email to Plaintiff filed in *Omni Innovations, LLC, et al. v. Inviva, Inc., et al.,* United States District Court, Western District of Washington at Seattle Case No. CV06-1537JCC, on June 14, 2007.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED at Kennewick, Washington, this 9th day of July, 2007.

By [signature]
CHERYL R.G. ADAMSON

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Robert J. Siegel, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ Cheryl R.G. Adamson / WSBA #19799
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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES S. GORDON, Jr., a married individual, d/b/a 'GORDONWORKS.COM'; OMNI INNOVATIONS, LLC., a Washington limited liability company, Plaintiffs, v. VIRTUMUNDO, INC., a Delaware Corporation, d/b/a ADNOWLEDGEMAIL.COM; ADKNOWLEDGE, INC., a Delaware Corporation, d/b/a ADKNOWLEDGEMAIL.COM; SCOTT LYNN, an individual; and JOHN DOES, 1-X, Defendants.	CASE NO. 06-0204-JCC ORDER

This matter comes before the Court on the following eleven motions:

(1) Defendants' Motion for Summary Judgment (Dkt. No. 98) and the associated motions by Defendants for Leave to File an Overlength Brief (Dkt. No. 97) and by Plaintiffs for Leave to Seal (Dkt. No. 120) the Declaration of Derek Newman (Dkt. No. 101);

(2) Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 53);

(3) Defendants' Motion for Bond for an Undertaking (Dkt. No. 38) and the associated motion by

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Defendants to Seal their Reply (Dkt. No. 91); and

(4) the discovery motions by Defendants to Compel Discovery (Dkt. No. 69), to Compel Segregation of Emails (Dkt. No. 71), to Exclude Testimony from Plaintiffs' lately disclosed witnesses (Dkt. No. 116), and to Compel Further Testimony regarding Prior Settlements (Dkt. No. 87) as well as the associated Motion to Seal (Dkt. No. 86).

This Court, having reviewed the materials submitted by the parties, as well as the complete record, and determined that oral argument is not necessary, hereby finds and rules as follows.

I. BACKGROUND

Plaintiffs James S. Gordon ("Gordon") and Omni Innovations, LLC ("Omni") have brought this action for alleged violations of the Federal CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701–7713 (First Cause of Action); the Washington Commercial Electronic Mail Act ("CEMA"), WASH. REV. CODE §§ 19.190.010–.110 (Second Cause of Action); the Washington Consumer Protection Act ("CPA"), WASH. REV. CODE §§ 19.86.010–.920 (Third Cause of Action); and the Washington "Prize Statute," WASH. REV. CODE §§ 19.170.010–.900 (Fourth Cause of Action). (Am. Compl. (Dkt. No. 15).) Gordon is a Washington resident and registrant of the internet domain gordonworks.com ("Gordonworks"). Omni is Gordon's business, which involves (1) software development and other endeavors and (2) a "spam business," which entails "[n]otifying spammers that they're violating the law" and filing lawsuits[1] if they do not stop sending e-mails to the Gordonworks domain. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 117–19.) Plaintiff Gordon alleges that between August 21, 2003 and February 15, 2006, he received materially false or misleading, unsolicited e-mail advertisements from Defendants that were transmitted through Omni's domain server to his e-mail address "jim@gordonworks.com," as well as to

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[1] Omni is a party to ten other similar cases in the Western District of Washington. *See* Case Nos. C06-1118-MJP, C06-1129-JCC, C06-1210-TSZ, C06-1284-TSZ, C06-1348-MJP, C06-1350-JCC, C06-1469-MJP, C06-1537-JCC, C07-222-RSM, and C07-386-MJP. Only one of these cases is designated "closed."

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other individuals using Gordonworks for domain hosting. (Am. Compl.) Plaintiffs'[2] most recent estimate of the number of these e-mails is 13,800. (Pls.' Partial SJ Mot., Gordon Decl. ¶ 26.)

Defendants Virtumundo, Inc. ("Virtumundo") and Adknowledge, Inc. ("Adknowledge") are non-Washington resident businesses that provide online marketing services to third-party clients. Virtumundo is a Delaware corporation with its principal place of business in Kansas. Adknowledge is also a Delaware corporation with its principal place of business in Missouri. Virtumundo and Adknowledge market products for their clients by transmitting e-mails to interested consumers. Defendant Scott Lynn ("Lynn") is a Missouri citizen and serves as Chief Executive Officer of Adknowledge. He is also the sole shareholder of both companies.[3]

On May 24, 2006, this Court denied Defendants' motion to dismiss for lack of personal jurisdiction (Order (Dkt. No. 24)) and on December 8, 2006, this Court granted in part and denied in part Defendants' motion to dismiss various claims for pleading deficiencies (Order (Dkt. No. 51)), granting leave to Plaintiffs to further amend their Amended Complaint to cure the identified defects. Plaintiffs never did so. Accordingly, the prior claim dismissals stand, such that no Prize Statute claims remain (entirely eliminating the Fourth Cause of Action) and Plaintiffs' "personally identifying information" CEMA claim, WASH. REV. CODE § 19.190.080, no longer remains (eliminating parts of the Second and Third Causes of Action). Defendants have now moved for summary judgment on all of Plaintiffs' remaining claims—which include CAN-SPAM claims (First Cause of Action), CEMA claims (Second Cause of Action), and CPA claims (Third Cause of Action) as they relate to surviving CEMA claims (but not to dismissed Prize Statute or CEMA claims). Because summary judgment on multiple grounds

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[2] Unless otherwise indicated, references to "Plaintiffs" include both Gordon and Omni.

[3] Unless otherwise indicated, references to "Defendants" include Adknowledge, Virtumundo, and Lynn. The Court notes that Defendants prefer to treat Lynn separately, but the outcome of this Order renders the distinction irrelevant for the purposes of this discussion, because the analysis herein applies to all of Plaintiffs' claims against all three Defendants. *See infra* section III.D.

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disposes of this case entirely, the Court's analysis is governed by the summary judgment standard, as follows.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment, and provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. The moving party bears the burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show that there is in fact a genuine issue for trial. *Anderson*, 477 U.S. at 250.

III. ANALYSIS

A. Federal CAN-SPAM Claims (First Cause of Action)

Because Defendants challenge Plaintiffs' standing to bring a private cause of action under CAN-SPAM, the Court must address this threshold issue prior to reaching the merits of their CAN-SPAM claims. The CAN-SPAM Act's primary enforcement provisions empower the Federal Trade Commission "FTC" and other federal agencies to pursue violators of the Act. 15 U.S.C. § 7706(a), (b). State attorneys general may bring civil enforcement actions. *Id.* § 7706(f). A limited private right of action

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also exists. The CAN-SPAM Act allows an action by a "provider of Internet access service adversely affected by a violation of" §§ 7704(a)(1), 7704(b), or 7704(d)[4] or "a pattern or practice that violates" § 7704(a)(2), (3), (4), or (5).[5] 15 U.S.C. § 7706(g)(1). "Internet access service" is defined in the CAN-SPAM Act, 15 U.S.C. § 7702(11), by way of reference to another federal statute, which provides as follows:

> The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

47 U.S.C. § 231(e)(4). Defendants argue that Plaintiffs cannot bring a private right of action because (1) they are not "Internet access service" ("IAS") providers as defined by the Act and (2) they have not been "adversely affected" by the violations they have alleged, as required by § 7706(g)(1).

The facts relevant to the standing inquiry are as follows. Plaintiff Gordon, via Plaintiff Omni,

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[4] Section 7704(a)(1) prohibits "false or misleading transmission information," as follows:

> It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph—
> (A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;
> (B) a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and
> (C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

15 U.S.C. § 7704(a)(1). Section 7704(b) deals with "aggravated violations" not at issue here, and § 7704(d) deals with warning label requirements for "commercial electronic mail containing sexually oriented material" not at issue here.

[5] A pattern or practice claim under these subsections must allege "deceptive subject headings" (§ 7704(a)(2)), "return address" and unsubscribe option violations (§ 7704(a)(3)), "transmission of commercial electronic mail after objection" allegations (§ 7704(a)(4)), or "identifier, opt-out, and physical address" violations (§ 7704(a)(5)).

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leases (from "GoDaddy") the server space that hosts the "Gordonworks" domain. (Pls.' Partial SJ Mot., Gordon Decl. ¶ 6; Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 115:10.) This is a "dedicated" server (meaning that he does not share his space with other GoDaddy clients), but Plaintiffs do not have physical control over the server "box," do not maintain or configure it, and have, in fact, never seen it. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 111–12.) This server is not backed up. (*Id.* at 110:25–111:1.) However, previously, and when receiving e-mails relevant to this lawsuit, Plaintiffs had a non-dedicated (shared) virtual server that was backed up. (*Id.* at 111:1–13.) Plaintiffs access their server virtually, by going to their "Plesk" interface, available through GoDaddy, to set up new e-mail accounts and new domains, as well as passwords for their clients. (*Id.* at 109:8–24, 214:10–19.) Moreover, Plaintiffs could not host their own server even if they chose to do so. Defendants point out that Plaintiffs' service agreement with Verizon, which Plaintiffs use to physically connect to the Internet, prohibits them from using Verizon's Broadband Service "to host any type of server personal or commercial in nature." (Defs.' Mot. for Bond, Townsend Decl. Ex. O (Verizon Agreement ¶ 3.7.5).) Plaintiffs do not address this issue.[6]

Plaintiffs operate a website at gordonworks.com, and they provided e-mail accounts to at least six clients "free for the first year, subject to data collection" for Plaintiff Gordon's "research purposes." (Defs.' Mot. for Bond, Townsend Decl. Ex. U (Plaintiffs' Response to Interrogatory No. 22 (identifying e-mail accounts for "Bonnie, Jamila, Jay, Jonathan, and Emily Abbey[,] Griffin Online Domain, and Anthony Potts").) According to Plaintiffs, Gordon began providing e-mail accounts by September 2003, and Gordon believes that his provision of these accounts, "building web sites for others, and maintaining a website that acts as a clearinghouse for job-search information and small business resources on the

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[6] On a final technical note, the parties engage in drawn-out disputes about "root account" access and "DNS server" operation. Even taking Plaintiffs' arguments as fact, the Court finds these factors immaterial to the standing analysis. The foregoing description of Plaintiffs' server setup is sufficient to assess Plaintiffs' IAS status.

World Wide Web" qualifies him as an IAS under the Act. (Pls.' Partial SJ Mot., Gordon Decl. ¶¶ 7–8.) Gordon also alleges that the e-mail accounts he had provided to others were "inundated with commercial electronic mail messages, rendering them unusable," and, consequently, he "took over the administration of those e-mail accounts and began directly receiving the e-mail sent thereto." (*Id.* ¶ 9.) His clients "relinquished control" of their e-mail accounts in 2003.[7] (Defs.' Reply re Mot. for Bond, Newman Decl. Ex. A (Draft Transcript of Dep. of Gordon) at 465:6–8.) At present, the only person other than himself who uses a "Gordonworks" e-mail address is Gordon's wife. (*Id.* at 465:9–14.) Nevertheless, Gordon did not disable the relinquished e-mail accounts, instead keeping them active for spam research. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 197:19–23.) Gordon testified that the "benefits" of receiving spam can be quantified in terms of his dissertation research, as well as "settlement agreements for people who have said that they wouldn't spam me any longer." (*Id.* at 222.)

On its GoDaddy server, Plaintiff Omni (whose first client appeared in May of 2005) hosts domains for its clients, who have e-mail addresses "@" their own domains, *i.e.*, not "@gordonworks.com." (Pls.' Partial SJ Mot., Declarations of Anthony Potts (Dkt. No. 56), Bonnie Gordon (Dkt. No. 57), Emily Abbey (Dkt. No. 58), Jamila Gordon (Dkt. No. 59), Jay Gordon (Dkt. No. 60), Jonathan Gordon (Dkt. No. 61), and Russell Flye (Dkt. No. 62).) Notably, more than half of these Omni clients share the "Gordon" surname. Each of them has multiple (up to fourteen) e-mail addresses at which they or others allegedly receive illegal spam. None of these clients has paid Plaintiffs for their services. All of Plaintiffs' income or revenue for 2006 and 2007 has been from "settlements and disputes." (Defs.' Reply re Mot. for Bond, Newman Decl. Ex. A (Draft Transcript of Dep. of Gordon) at 46:20–22.)

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[7] The effective date of the CAN-SPAM Act is January 1, 2004. CAN-SPAM Act of 2003, Pub. L. No. 108-187, § 16 (approved Dec. 16, 2003) (note to 15 U.S.C. § 7701). Thus, Omni's initiation of "services" to clients in 2005, described *infra*, appears to be relevant to CAN-SPAM claims as well as Washington state law claims, while the gordonworks.com services described here likely are relevant *only* to Plaintiffs' Washington CEMA claims, because CEMA was enacted in 1998 and revised in 1999 (and thus was in effect in 2003). 1998 Wash. Legis. Serv. Ch. 149 (West) (S.H.B. 2752); 1999 Wash. Legis. Serv. Ch. 298 (West) (S.H.B. 1037). Facts regarding gordonworks.com are presented here to demonstrate the historical development of Plaintiffs as entities with potential CAN-SPAM standing.

Gordon generally alleges that "[d]ue to the limited technological resources available to me as a small business, the sheer volume of the spam sent by Defendants has made it extremely difficult to manage, and has cost me untold hours of manpower, and substantial resources." (Pls.' Partial SJ Mot., Gordon Decl. ¶ 26.) However, Gordon has not hired any staff to deal with this administrative situation nor elaborated on the "resources" he has spent. Plaintiffs utilize spam filters, which catch and mark spam before it arrives in Plaintiffs' inboxes. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 81–82; 217; 220.) Defendants suggest that Gordon's sorting effort is "exclusively directed toward litigation preparation," and consists of sorting batches of (already-identified) spam e-mails, sent to him by clients "unsorted in lots of 10–50,000" for use in his multiple spam lawsuits. (Defs.' Opp'n to Partial SJ 10 (quoting Pls.' Opp'n to Mot. to Compel Segregation of Emails, Gordon Decl. ¶ 3 ("The job of collecting, sorting, and compiling records on this and other defendants is a very time-consuming process.")).)

As for technical impact, it is undisputed that Plaintiff Omni's lease provides access to 500 gigabytes of data transfer space ("bandwidth") per month through server-host GoDaddy. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 110:16–22.) Gordon acknowledges that he has not "come close" to using all of that bandwidth. (*Id.* at 110:22.) Nor have his server costs gone up due to spam. Gordon has testified that, despite his allegations that Defendants' e-mails are false or misleading, he has not been misled or confused by any "from lines" in Defendants' e-mails. (*Id.* at 394:18–20.)

Significantly, Gordon testified that he is not seeking actual damages in the instant litigation (because none exist) and that he is instead seeking solely statutory damages for each e-mail sent. (Defs.' SJ Mot., Newman Decl. Ex. A (Dep. of Gordon) at 319:18–320:22.) For example, in Plaintiffs' motion for partial summary judgment, Plaintiffs seek CAN-SPAM statutory damages for 7,890 allegedly illegal e-mails, pursuant to 15 U.S.C. § 7706(g), of $100 per e-mail, to be tripled for violations committed "willfully and knowingly." (Pls.' Partial SJ Mot. 23–24.) The CAN-SPAM portion of Plaintiffs' statutory damages request is therefore $2,367,000.[8] In his final opportunity at dispositive briefing, Gordon again raised no allegation of actual damages, did not dispute the facts described *supra*, and instead asserted that he and his clients having to go through spam e-mails is sufficient "adverse effect" to meet the statutory standing requirement. (Pls.' Opp'n to SJ 17–18.)

The Court now turns to whether Plaintiffs qualify as an IAS that was "adversely affected" by Defendants' alleged CAN-SPAM violations. Defendants submit that the free e-mail account and domain services and the existence of the Gordonworks domain, along with the structure of Plaintiffs vis-a-vis the Internet and other entities, cannot suffice to make Plaintiffs the type of IAS that Congress intended to have a private right of action. Defendants further contend that Plaintiffs have realized no adverse effects, even if they are an IAS. Almost no caselaw exists on the issue of what qualifies an entity as an IAS that is adversely affected, and the statutory language is far less detailed than the facts of this or other cases.

Beginning with the definition of an IAS, the plain language of the statute provides:

> The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

47 U.S.C. § 231(e)(4). It is not clear what exactly the exceedingly broad phrase "service that enables users to access" means, and the parties dispute whether this definition incorporates any technical, hardware, or space requirements, and ultimately, whether it includes Plaintiffs. The Court finds that, although "Internet access service" is defined (by incorporation) in the CAN-SPAM Act, the statutory definition of an IAS is nevertheless ambiguous. Congress's language is not particularly illuminating except where the definition provides examples ("electronic mail") or exclusions ("telecommunications services").

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[8] Plaintiffs' partial summary judgment motion requests a total of $10,257,000 in statutory damages: $2,367,000 pursuant to CAN-SPAM and $7,890,000 pursuant to CEMA, which allows $1,000 per illegal e-mail. WASH. REV. CODE §§ 19.190.040(2).

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In arguing that they are an IAS, Plaintiffs rely on what appears to be one of the *two*[9] cases assessing whether a CAN-SPAM plaintiff has standing. In this unreported case, *Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C04-5203-SI, 2006 WL 648688 (N.D. Cal. Mar. 8, 2006), the district court found that the plaintiff was an IAS because provision of e-mail services alone was sufficient, regardless of whether other services were also provided. *Id.* at *3. Because the plaintiff in *Hypertouch* "administer[ed] its own e-mail servers," it was an IAS, "regardless of who is listed as owning the domains associated with those servers." *Id.* The *Hypertouch* court also found that the provision of e-mail services at no charge did not change the analysis, because Congress considered free e-mail services when passing the CAN-SPAM Act. *Id.* The *Hypertouch* court then found the "adverse effect" element satisfied as well, because the plaintiff had experienced "decreased server response and crashes," "higher bandwidth utilization," and was "forced" to implement "expensive hardware and software upgrades." *Id.* at *4. Accordingly, because the *Hypertouch* plaintiff met both prongs, the district court found that it had standing, though it ultimately lost on the merits. *Id.*

While it did not directly so find, the *Hypertouch* court apparently found the foregoing IAS definition ambiguous as well, because it considered "congressional intent" in reaching its conclusion. Courts are entitled to rely on legislative history only after a statute is deemed ambiguous on its face. *United States v. Curtis-Nev. Mines, Inc.*, 611 F.2d 1277, 1280 n.1 (9th Cir. 1980) ("When a statute is ambiguous, reports of committees of the Congress may be used as an aid to ascertaining the purpose of Congress in passing the statute. Additionally, it is the duty of a court in construing a law to consider the circumstances under which it was passed and the object to be accomplished by it.") (internal citations and quotations omitted). This Court finds the legislative history particularly instructive to the standing inquiry but comes to a different conclusion than the *Hypertouch* court, because the facts of the instant case are distinguishable.

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[9] The other relevant case is *White Buffalo Ventures v. Univ. of Texas*, 420 F.3d 366 (5th Cir. 2005). There, the court found that the University of Texas was an IAS, but did so in the context of a preemption analysis. *Id.* at 372–73. Accordingly the Fifth Circuit had no occasion to consider the second standing question regarding "adverse effect."

In the Committee Report, under the heading "Costs to ISPs,[10] Consumers, and Businesses," the Senate Committee on Commerce, Science, and Transportation found that "[s]pam imposes significant economic burdens on ISPs, consumers and businesses" because "[m]assive volumes of spam can clog a computer network, slowing Internet service for those who share that network. ISPs must respond to rising volumes of spam by investing in new equipment to increase capacity and customer service personnel to deal with increased subscriber complaints." S. REP. NO. 108-102, at 6 (2003) (Comm. Rep. on CAN-SPAM Act of 2003 (S. 877)). "Dictionary attacks" can hijack a server, slowing it and making it appear that legitimate users are sending spam, and "web bugs" communicate back to the spammer from the recipient's computer. *Id.* at 3–4. Increased costs of anti-spam software are "passed on as increased charges to consumers . . . . [and] some observers expect that free e-mail services . . . will be downsized." *Id.* at 6. The Committee also noted that "[a]lthough Internet access through broadband connections is steadily growing, a dial-up modem continues to be the method by which a vast majority of Americans access the Internet and their e-mail accounts." *Id.* at 7. The "per-minute" and long distance charges for Internet connections for many e-mail users were exacerbated by time spent on manual spam filtering, resulting in additional per-customer costs. *Id.*

In subsequently describing the various enforcement provisions in the Act, the Committee discussed the private right of action provision at issue here, which

> would allow a provider of Internet access service adversely affected by a violation . . . to bring a civil action. . . . This could include a service provider who carried unlawful spam over its facilities or who operated a website or online service from which recipient e-mail addresses were harvested in connection with a violation . . . .

Id. at 21. Moreover, on the House side, Representative John Dingell stated that the standing provision at

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[10] Congress gave examples of "ISPs" (Internet Service Providers) as being Microsoft's MSN mail and Hotmail, as well as Earthlink, in a discussion of the impact of spam on network functioning. S. REP. NO. 108-102, at 3.

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issue here "provides for a *limited* right of action by bona fide Internet service providers." 150 CONG. REC. E72 (January 28, 2004) (emphasis added). Later, Rep. Dingell stated, "Additionally, we intend that Internet access service providers provide actual Internet access service to customers." *Id.* at E73.

The foregoing legislative history suggests several things with respect to the scope of the private right of action. First and foremost, the plain statutory language requiring that (1) an IAS (2) suffer "adverse effect" is confirmed. Specifically, the definition of an IAS ought to be considered in conjunction with the harm caused to IASs (or ISPs as Congress alternately refers to them) when trying to divine Congress's intent. The most significant harms enumerated by Congress were ISP- or IAS-specific, going well beyond the consumer-specific burden of sorting through an inbox full of spam. These harms to IASs or ISPs relate to network functioning, bandwidth usage, increased demands for personnel, and new equipment needs, which eventually cost consumers. S. REP. NO. 108-102, at 6. Because these harms were defined in terms of Internet access service providers, and because standing was conferred only on IASs (not consumers), it follows that such harms must be (1) possible and (2) actually occur, if a private entity is to have standing under the Act. *Id.* at 21 (reiterating that the private right of action is for a "*provider of Internet access service adversely affected* by a violation," not individual e-mail users and not IASs experiencing no adverse effects). Thus, even if an entity could meet the ill-defined and broad definition of an IAS, the "adverse effect" to that entity must be both real and of the type uniquely experienced by IASs for standing to exist. Any other reading would expand the private right of action beyond what Congress intended.

Defendant repeatedly points out that Plaintiffs have no paying "customers" and their provision of free e-mail precludes status as an IAS. The Court disagrees with this interpretation, in light of Congress's clear references to free e-mail services and the corrosive effect of spam on free e-mail providers, such as Microsoft and Earthlink. Rather, in light of the legislative history as it relates to IAS requirements, it is notable that Plaintiffs lease a server housed with GoDaddy which is accessed solely through an interface that GoDaddy provides via Verizon's internet connection. Congress has not in specific terms spoken to whether and how Plaintiffs' relationships with GoDaddy or Verizon matter, but because other entities actually house the hardware and bandwidth that could be burdened by spam, Plaintiffs' structural dependence might be quite significant. Morever, because Plaintiffs' volume is so small, it is unlikely that they alone would realize the ISP- or IAS-specific strains described by Congress before it chose to confer a private right of action only on those entities. Therefore, Plaintiffs' small scale, when combined with their obvious dependence on other entities, suggests that Plaintiffs' burdens, if any, would be shared and likely borne almost entirely by other entities if they ever were to materialize. Apart from the question of whether Plaintiffs actually realized any adverse effects, these factors suggest that Plaintiffs might not be an IAS as Congress envisioned one.

Nevertheless, it is fairly clear that Plaintiffs are, in the most general terms, a "service that enables users to access" Internet content and e-mail, and accordingly, they qualify as an IAS under the statute's capacious definition. Regardless, Plaintiffs clearly have not actually borne the ISP- or IAS-specific burdens described by Congress. Therefore, because they cannot show "adverse effect," which is inherent in the definition of private standing under 15 U.S.C. § 7706(g)(1), it is irrelevant whether Plaintiffs are a true IAS. For the following reasons, the Court finds that Plaintiffs do not have CAN-SPAM standing regardless of whether they are an IAS.

Specifically, Plaintiffs undisputedly have suffered no harm related to bandwidth, hardware, Internet connectivity, network integrity, overhead costs, fees, staffing, or equipment costs, and they have alleged absolutely no financial hardship or expense due to e-mails they received from Defendants. Plaintiffs have spam filters available to them, and such filters continue to become more sophisticated. Nor do Plaintiffs allege that they use "dial-up," the costs associated with which were specifically discussed by Congress (and likely are becoming an obsolete concern as high-speed broadband usage becomes the norm). Moreover, even if there is some negligible burden to be inferred from the mere fact that unwanted e-mails have come to Plaintiffs' domain, it is clear to the Court that whatever harm might exist due to that inconvenience, it is not enough to establish the "adverse effect" intended by Congress.

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Indeed, the only harm Plaintiffs have alleged is the type of harm typically experienced by most e-mail users. The fact that Congress did not confer a private right of action on consumers at large means that "adverse effect" as a *type* of harm must rise beyond the level typically experienced by consumers—*i.e.*, beyond the annoyance of spam.

Not only must CAN-SPAM private plaintiffs allege a particular type of harm, the adverse effect they allege must be significant. To hold otherwise would lead to absurd results. For instance, Plaintiffs' client Anthony Potts states that, using the domain Omni established and registered for him, he has provided nine e-mail addresses to Washington residents at the "anthonycentral.com" domain. (Pls.' Partial SJ Mot., Potts Decl. ¶ 4.) Accordingly, Mr. Potts appears as well to be a "service that enables users to access" Internet content and e-mail under the broadest interpretation of what an IAS is. If Mr. Potts is an IAS, is he too an intended holder of a private right of action under CAN-SPAM? Are, in turn, his "clients" (e-mail account holders who might provide "services" to others) also intended plaintiffs? If Congress's "limited" provision of a private right of action is to have any traction at all, the quantum of harm for Plaintiffs or Mr. Potts or any other purported IAS must be *significant*.

The necessity of a showing of significant adverse effect is particularly evident in the instant case, where Plaintiffs seek *solely* statutory damages. Indeed, Plaintiffs seek nearly $2.4 million in what amount to punitive fines on Defendants, calculated per e-mail. Because Congress provided a private right of action only to "provider[s] of Internet access service *adversely affected*," 15 U.S.C. § 7706(g)(1) (emphasis added), it must be that Congress intended standing to require a showing of some significant harm to justify such steep statutory damages pursuant to § 7706(g)(3). Statutory damages under CAN-SPAM never would be a function of actual damages. However, "adverse effect" is a textual prerequisite to claiming these damages. Any other construction would impose strict liability on spammers for e-mails received by *any* IAS regardless of adverse impact, thereby rendering the "adversely affected" language of the private right of action provision superfluous. Such is an impermissible result in any statutory construction. Accordingly, substantial actual harm must exist before these exorbitant amounts of statutory damages are available to private plaintiffs. Once a plaintiff shows sufficient harm, it is clear that Congress intended to make a statement by imposing these large per-e-mail fines. Yet, permitting private parties with *no harm* to invoke CAN-SPAM to collect millions of dollars surely is not what Congress intended when it crafted this "limited" private right of action. Congress simply did not intend for anyone—IAS or not—to be able to utilize the limited private right of action provided in the Act despite being unable to allege, much less prove, adverse effect. Without a requirement of significant adverse impact, Congress's "limited" private right of action would become available to almost anyone.

Finally, Congress's reference to "bona fide Internet service providers" merits comment. Plaintiffs' clients are few, most appearing to be family members. Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity that Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

Taking the facts as a whole, the Court finds that Plaintiffs lack standing to sue under § 7706(g)(1). Because Plaintiffs have no standing, their CAN-SPAM claims must be DISMISSED and the Court has no occasion to reach the parties' arguments on the merits of those claims.

B. Washington CEMA Claims (Second Cause of Action)

Defendants claim that Plaintiffs' Washington CEMA claims are preempted by the CAN-SPAM Act. The CAN-SPAM Act contains an expressed preemption clause. The United States Supreme Court has held that, when evaluating federal statutes that expressly preempt state law, "analysis of the scope" of the preemption clause "must begin with its text." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). However, "interpretation of that language does not occur in a contextual vacuum. Rather, that

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interpretation is informed by two presumptions about the nature of pre-emption." *Id.* at 485. First, due to the presumption that "Congress does not cavalierly pre-empt state-law causes of action," a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (internal quotations and citations omitted). Second, a court must be guided by the principle that "any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* at 485–86 (emphasis in original) (internal quotations and citations omitted). This analysis applies to allegations that an entire state statutory scheme is preempted, as well as to allegations that only particular claims within that structure are preempted. *Id.*

The CAN-SPAM Act's preemption clause provides:

> This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.*

15 U.S.C. § 7707(b)(1) (emphasis added). Moreover, as part of the CAN-SPAM enactment, Congress made the following finding:

> Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

Id. § 7701(a)(11). The question before the Court is whether Plaintiffs' Washington CEMA claims fit into the § 7707(b)(1) savings clause designated by Congress as the single exception to CAN-SPAM's broad preemption of state electronic mail legislation.

Plaintiffs' remaining CEMA claims arise under section 19.190.020 of CEMA.[11] This section provides:

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[11] The Court recognizes that Plaintiffs have pled under the Consumer Protection Act "conspiracy" section of CEMA as well. WASH. REV. CODE § 19.190.030. However, it does not differ

> (1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:
>
> (a) Uses a third party's internet domain name without permission of the third party, or *otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message*; or
>
> (b) *Contains false or misleading information in the subject line.*
>
> (2) For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

WASH. REV. CODE § 19.190.020 (emphasis added). It is undisputed that the italicized language above forms the basis for Plaintiffs' claims regarding Defendants' e-mails.

The precise contours of Plaintiffs' CEMA claims are important to the preemption analysis. In Plaintiffs' summary judgment motion, as well as in responding to Defendants' summary judgment motion, Plaintiffs' sole focus is on the allegedly misleading "headers" in 7,890 of Defendants' e-mails. (*See* Pls.' Partial SJ Mot. 2–19; Pls.' Opp'n to SJ *passim*.) The Court notes that Plaintiffs pled under CEMA for false or misleading subject lines and Defendants moved for summary judgment on these claims. However, Plaintiffs' Opposition brief contains only a single reference to the "subject line" claims, which precedes the conclusory statement that "Gordon contests" Defendants' arguments regarding subject lines. (Pls.' Opp'n to SJ 20.) Plaintiffs do not allege that any genuine issue of material fact exists as to the subject line claims or offer any evidence going to these claims. Accordingly, these claims must fail. Plaintiffs' arguments in their Opposition brief regarding the body of the e-mails relate only to CAN-SPAM claims, *see supra* note 5, and are not relevant to the instant discussion of CEMA claims. Therefore, the only substantive CEMA claims relevant to the preemption analysis relate to "from lines" in

---

from section 19.190.020 in such a way that requires separate analysis.

"headers."

Specifically, Plaintiffs allege that Defendants' headers violate both CAN-SPAM and CEMA because the "from line" does not include Defendants' company names or the names of company personnel. Instead, the "from line" contains a "from name" referencing a topic area or type of advertisement (such as "Criminal Justice") along with a "from address" showing the e-mail address of the sender (such as "CriminalJustice@vm-mail.com"). So, for example, while "vm-mail.com" is one of Defendant Virtumundo's domains, Plaintiffs' claims are that these headers are misleading because they "misrepresent[] or obscure[] . . . information in identifying the point of origin or the transmission path" because the "from name" alone does not identify Defendant Virtumundo. The Court must determine whether such claims are preempted by CAN-SPAM.

In a case analyzing an Oklahoma law, *Omega World Travel v. Mummagraphics, Inc.*, 469 F.3d 348, 353 (5th Cir. 2006), the Fifth Circuit analyzed a statute prohibiting a sender of e-mail from "misrepresent[ing] any information in identifying the point of origin or the transmission path of the electronic mail message" or sending a message that lacks "information identifying the point of origin or th transmission path" or "[c]ontains false, malicious, or misleading information which purposely or negligently injuries a person." There, in comparing the plaintiffs' claims to the statutes in question, the *Omega* court first affirmed the district court's finding that the plaintiffs' claims were for "immaterial errors" or misrepresentations in the e-mails at issue. *Id.* at 353. For example, the plaintiffs had claimed that the messages (1) stated that the recipients had signed up for the mailing list when they actually had not, (2) contained header information, and in particular a "from address" that was not linked to the actual sender, and (3) contained "from addresses" that the sender had stopped using. *Id.* at 351. The *Omega* court then turned to the text of § 7707(b)(1), scrutinizing the terms "falsity or deception" and concluding that they are linked contextually, such that the statute's savings clause was not meant to "sweep up" mere errors. *Id.* at 354. Rather, the *Omega* court found that because only "materially false or materially misleading" header information was actionable under CAN-SPAM, Congress could not have intended, by

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way of the savings clause, to allow states to undermine that choice by imposing "strict liability for insignificant inaccuracies." *Id.* at 355. The *Omega* court found that the plaintiffs' reading of the savings clause within the preemption clause would create "a loophole so broad that it would virtually swallow the preemption clause itself." *Id.*

The CAN-SPAM legislative history underscores that the *Omega* court's holding is correct. In discussing the preemption clause and its savings clause, the Committee explained that only statutes that "target fraud or deception" would be saved. S. REP. NO. 108-102, at 21. Indeed, a "State law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted. By contrast, a State law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted." *Id.* In light of the impossibility of a sender knowing to which state an e-mail would be sent and the resultant inability to know with which laws to comply, the Committee believed strongly in the necessity of "one national standard" except where e-mails were fraudulent or deceptive. *Id.* at 21–22.

This Court agrees with the *Omega* court's assessment of congressional purpose as well as its preemption holding. Applying the *Omega* analysis here, the Court finds the following. Plaintiffs' allegations here are that "from addresses" ending, for example, with "vm-mail.com" do not suffice to make the header not false or misleading because they require one to figure out to whom or what "vm-mail.com" refers—*i.e.*, the message is not obviously from "Virtumundo." The parties agree that identification can be achieved by reverse-look-up using, for example, the "WHOIS" database, which "is an Internet program that allows users to query a database of people and other Internet entities, such as domains, networks, and hosts." Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act; Proposed Rule, 70 Fed. Reg. 25,426, 25,446 n.233 (May 12, 2005). The WHOIS database is maintained by domain registrars and "includes the registrant's company name, address, phone number, and e-mail address." *Id.* Plaintiffs do not dispute that WHOIS data can identify Defendants, and they have pointed to no e-mails that fail to provide information useful to a correct WHOIS look-up.

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Plaintiffs instead contend that this extra step should not be required of consumers. Regardless of the merits of that argument, the Court cannot find that "from addresses" ending with a domain that facilitates an accurate identification of Defendants could in any sense be found "false" or "deceptive." Accordingly, while claims actually alleging falsity or deception under CEMA would not be preempted, Plaintiffs' claims here—for, at best, "incomplete" or less than comprehensive information—are for immaterial errors that may not be litigated under state law. Plaintiffs have not raised any issues of material fact that could prove Defendants' e-mails materially "false or deceptive" as those terms are used in the CAN-SPAM Act. Accordingly, Plaintiffs' CEMA claims are preempted by CAN-SPAM.

In arguing against such a result, Plaintiffs cite to another of their cases, *Gordon v. Impulse Marketing Group, Inc.*, 375 F. Supp. 2d 1040, 1044–46 (E.D. Wash. 2005), wherein the district court found Gordon's claims were not preempted. Plaintiffs argue that this preemption holding compels the same result here. However, that ruling was on an early Rule 12(b)(6) motion and the contours of Gordon's claims were not discussed in the opinion. This Court does not disagree with the general proposition that some CEMA claims are not preempted. Indeed, as noted above, CEMA claims that allege "false or deceptive" e-mail headers would fit into Congress's savings clause. However, in the instant case, the Court has the benefit of extensive summary judgment briefing and a record that clarifies the nature of Plaintiffs' claims. The claims in the instant case are not for "falsity or deception," and therefore they are preempted and must be DISMISSED.

C. Washington CPA Claims (Third Cause of Action)

In its December 8, 2006 Order (Dkt. No. 51), this Court discussed the five elements to a CPA claim: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) the injury must be causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535–37 (Wash. 1986). A violation of CEMA satisfies the first three *Hangman Ridge* elements. Because Plaintiffs' preempted CEMA claims are the basis for their CPA claims, the CPA claims too must fail. Moreover, while an allegation of damage or harm was sufficient to survive a prior Rule 12(b)(6) motion in the instant case, the record has now been developed and it is undisputed that Plaintiffs have suffered no actual harm and are instead seeking only statutory damages. Accordingly, there is no genuine issue of material fact as to the injury element of Plaintiffs' CPA claim. For the foregoing reasons, Plaintiffs' CPA claims must be DISMISSED.

D. Request to Separately Dismiss Defendant Scott Lynn

Defendants' motion for summary judgment to dismiss Scott Lynn is MOOT because the legal analysis of both federal and state claims disposed of all claims against all Defendants without need to reach the merits of any claims against Mr. Lynn in particular.

E. Miscellaneous Motions to Seal, Strike, and File Overlength Briefing

(1) Defendants' reasonable request (Dkt. No. 97) to file an overlength summary judgment motion is GRANTED.

(2) Plaintiffs' motion to seal (Dkt. No. 120) the declaration of Derek Newman (Dkt. No. 101) filed in support of Defendants' summary judgment motion is DENIED. Plaintiffs argue that the entire 489-page Gordon deposition exhibit should be sealed because four pages therein were designated "confidential" pursuant to the parties' protective order in this case. Under Local Civil Rule CR 5(g)(1), there is a "strong presumption of public access to the court's files and records which may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting files, records, or documents from public review." Simply because portions of the deposition were designated as "confidential" during discovery does not justify sealing them from public view when filed on the Court's docket. Nor do the oblique references to settlements therein constitute a "compelling showing" that this significant amount of material should be sealed. Accordingly, the motion is DENIED.

(3) Defendants move to seal (Dkt. No. 91) their entire Reply (Dkt. Nos. 92 and 93) filed in support of their motion for bond because it contains, as an exhibit, Gordon deposition testimony that was

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designated "confidential" pursuant to the parties' protective order. However, Defendants do not believe the material is confidential. Plaintiffs have not commented with respect to this particular motion. As with the deposition exhibit described *supra*, Local Rule 5(g)(1) requires more than a "confidential" designation and an unspecific sweeping request to seal an entire brief and all of its exhibits. Accordingly, the motion is DENIED and the Clerk is DIRECTED to UNSEAL the Reply and accompanying materials (Dkt. Nos. 92 and 93).

(4) Defendants' motion to seal (Dkt. No. 86) their motion to compel further testimony (Dkt. No. 87) again seeks to seal deposition testimony that does not actually disclose the sensitive material that is the subject of the motion to compel. The motion to compel merely relies on Gordon deposition testimony that is not properly sealed under the standard of Rule 5(g)(1). Accordingly this motion is DENIED and the Clerk is DIRECTED to UNSEAL the motion and accompanying materials (Dkt. Nos. 87 and 88).

(5) In their Surreply (Dkt. No. 94) to Defendants' motion for bond, Plaintiffs move to strike the Draft transcript of Gordon's deposition testimony as incomplete. This request is DENIED as MOOT because the entire transcript was available to this Court in ruling on the instant motions and any excerpts from the draft were considered in context. Likewise, Plaintiffs' motions to strike argument from Defendants' pleadings on the motion for bond are DENIED as MOOT because there is no need to rule on the motion for bond in light of the dispositive holdings in this Order. The Court GRANTS Plaintiffs' request that their motion for partial summary judgment be considered a "Response" to Defendants' motion for bond.

(6) In their Opposition (Dkt. No. 82) to Plaintiffs' partial summary judgment motion, Defendants move to strike much of Plaintiffs' argument and evidence as inadmissible hearsay or speculation lacking foundation. The Court has considered these objections and DENIES Defendants' motion to strike this evidence because the Court did not consider inadmissible evidence or speculation in ruling on the instant motions, and, as the prevailing parties, Defendants were not prejudiced by Plaintiffs' submittal in any event.

(7) In their Opposition (Dkt. No. 104) to Defendants' summary judgment motion, Plaintiffs move to strike the Declaration of Mr. Krawetz and his expert report submitted with Defendants' motion materials. However, the Court DENIES this motion because there was no need to consider Mr. Krawetz's declaration or expert report in ruling on the instant motions. Rather, the content of those materials went either to the merits of CAN-SPAM claims for which Plaintiff has no standing or to the immaterial errors alleged in preempted CEMA claims. Plaintiffs also move to strike Defendants' spreadsheets submitted as exhibits to the Declaration of Derek Linke (Dkt. No. 102). Again, the Court DENIES this motion because these exhibits are relevant to the merits of claims never reached, and, in any event, such summaries would be admissible under Federal Rule of Evidence 1006.

(8) In their Reply (Dkt. No. 108) in support of their summary judgment motion, Defendants move to strike portions of Plaintiffs' Opposition brief and the Gordon Declaration (Dkt. No. 107) to the extent that they contradict Gordon's prior deposition testimony. Indeed, "[t]he general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). The same rule applies to interrogatory responses. *School Dist. No. 1J v. AcandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993). To the extent that Plaintiff Gordon's Declaration attempts to contradict his earlier deposition testimony about Omni being in the "spam business," it is STRICKEN. Gordon was deposed in detail on this issue. However, the Court notes that this testimony was not by any stretch dispositive in considering the instant motions, and accordingly, undue weight should not be placed on this issue one way or the other. All other requests to strike improper self-impeachment are DENIED because they go to merits of claims not reached herein.

(9) Also in their Reply (Dkt. No. 108), Defendants move to strike the "Microsoft Bulletin" (Dkt. No. 63-11) submitted in support of Plaintiffs' partial summary judgment motion and the "unsubscribe" e-mails sent to Defendants regarding e-mails not at issue in this lawsuit, submitted as

Exhibit A to the Declaration of Robert Siegel (Dkt. No. 106). The motion regarding the "Microsoft Bulletin" is DENIED because that exhibit goes to merits not reached. The motion regarding the "unsubscribe e-mails" is GRANTED, because while it goes to merits not reached, such e-mails are wholly irrelevant to this case as well as improper hearsay and inadmissible character evidence.

IV. CONCLUSION

For the foregoing reasons,

(1) Defendants' Motion for Summary Judgment (Dkt. No. 98) and the associated motion by Defendants for Leave to File an Overlength Brief (Dkt. No. 97) are GRANTED and Plaintiffs' Motion for Leave to Seal (Dkt. No. 120) the Declaration of Derek Newman (Dkt. No. 101) is DENIED;

(2) Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 53) is DENIED because Plaintiffs have no standing to bring CAN-SPAM claims;

(3) Defendants' Motion for Bond for an Undertaking (Dkt. No. 38) is STRICKEN as MOOT; Defendants may move for attorneys' fees in light of this Order; and the associated motion by Defendants to Seal their Reply (Dkt. No. 91) is DENIED and the Clerk is DIRECTED to UNSEAL the Reply and accompanying materials (Dkt. Nos. 92 and 93);

(4) the discovery motions by Defendants to Compel Discovery (Dkt. No. 69), to Compel Segregation of Emails (Dkt. No. 71), to Compel Further Testimony regarding Prior Settlements (Dkt. No. 87), and to Exclude Testimony from Plaintiffs' lately disclosed witnesses (Dkt. No. 116) are all STRICKEN as MOOT. The Motion to Seal (Dkt. No. 86) associated with the Motion to Compel Further Testimony is DENIED and the Clerk is DIRECTED to UNSEAL the motion and accompanying materials (Dkt. Nos. 87 and 88); and

(5) The June 18, 2007 trial date and all associated deadlines are hereby STRICKEN.

As the prevailing parties, Defendants may file a motion for attorneys fees pursuant to 15 U.S.C. § 7706(g)(4) and for entry of final judgment in this matter. Defendants are hereby DIRECTED to confer with opposing counsel and advise the Court of a proposed schedule for briefing these remaining issues.

SO ORDERED this 15th day of May, 2007.

John C. Coughenour
United States District Judge

EXHIBIT 2

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THE HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability company; JAMES S. GORDON, JR., a married individual, **Plaintiffs,** v. **INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Life Insurance Co. of New York; and JOHN DOES, I-X,** **Defendants,**	**NO.** CV-06-1537-JCC **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PERMANENTLY ENJOINING DEFENDANTS FROM SENDING COMMERCIAL EMAIL TO PLAINTIFF**

Plaintiffs, by and through undersigned counsel, hereby move the Court for an order for

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partial summary judgment permanently enjoining Defendants from sending any further commercial email to Plaintiffs .

Legal Standard

A court should grant summary judgment when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. A court must regard the evidence in the most favorable light to the nonmoving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.,* 377 F.3d 408, 418 (4th Cir.2004). Once a summary judgment motion is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). There are no material facts in dispute, and this case is ripe for summary judgment as to the issues presented here.

1. There are No Material Issues of Fact to Preclude the Entry of a Permanent Injunction Prohibiting Defendants or Others on Defendants' Behalf from Sending Spam to Plaintiffs. Plaintiffs' Complaint includes a claim for a permanent injunction against Defendants. It is indisputable that Plaintiffs Omni Innovations LLC and James S. Gordon Jr. (hereafter collectively "Gordon") have received numerous commercial electronic mail messages (hereinafter "spam") transmitted by, or on behalf of Defendants. (See Declaration of James S. Gordon, Jr. submitted herewith). It is likewise indisputable that Gordon never wanted to receive spam from Defendants, and that Gordon has made significant efforts to notify, and has notified Defendants of their desire not to receive spam from them (See Declaration of James S. Gordon, Jr. submitted herewith). It is further indisputable that Gordon has been adversely affected by the

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receipt of spam from Defendants and others who send spam (See Declaration of James S. Gordon, Jr. submitted herewith).

2. The Federal Can-Spam Act Requires Commercial Emailers such as Defendants to Stop Sending Spam to Recipients who Request Them to Stop. A permanent injunction under the CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003), 15 U.S.C. §§ 7701-7713 (hereafter "CAN SPAM") preventing a party from sending unwanted further spam is well within precedent. In *Am. Online v. Smith,* the U.S. District Court for the Eastern District of Virginia enjoined a spammer from further sending spam to America Online and its customers on a summary judgment motion. *Am. Online v. Smith*, Civil Action No. 05-0344, 2006 U.S. Dist. LEXIS 4813, January 24, 2006. It is unfortunate that it has come to this. Generally, CAN SPAM actually requires a spammer to leave a party alone without the necessity of the intervention of a Court. However, where, as here, a defendant will not simply comply with CAN SPAM's requirements, an aggrieved party has no recourse except to ask for a Court to intervene. The requirement that a spammer leave a party alone at that party's request is crystal clear. 15 USC 7704(a)(4) provides:

> (4) PROHIBITION OF TRANSMISSION OF COMMERCIAL ELECTRONIC MAIL AFTER OBJECTION-
>
> (A) IN GENERAL- If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful--
>
> (i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;
>
> (ii) for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message

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> with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;
> (iii) for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate clause (i) or (ii); or
> (iv) for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law.

As set forth in the Gordon Declaration, prior to filing this lawsuit, he repeatedly requested that Defendants stop sending spam to him by a variety of means, including those provided by the Defendants that purportedly allow Gordon to "opt out" of receiving their spam. However, Defendants ignored these repeated requests, and continued to send Gordon spam. Gordon further put Defendants on notice that he does not want to receive their spam by virtue of this lawsuit, and by providing the Defendants copies of the offending spam in discovery. Plaintiff's initial disclosures and his discovery responses contain all of the email addresses at Gordon's server to which Defendants have sent its spam. Defendants have again ignored this notice, and have continued to send Gordon spam throughout the pendancy of this lawsuit.

Even if the Court were unwilling to believe that Gordon has made these repeated requests prior to filing this suit, and ignores the fact that this lawsuit served as further notice to the Defendants that Gordon doesn't want their spam, it becomes indisputable that Gordon is making

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the same request now. Pursuant to 15 USC 7704(a)(4)(A), Gordon hereby requests that Defendants, together with any person or persons acting on behalf of or in concert with Defendants, cease and desist from initiating the transmission of all further email to any and all email addresses at any and all of the following domains hosted by Gordon's Internet Access Service:

Anthonycentral.com; Celiajay.com; Chiefmusician.net; Ehahome.com; Ewaterdragon.com; Gordonworks.com; Itdidnotendright.com; Jammtomm.com; Jaycelia.com; Jaykaysplace.com; Rcw19190020.com.

It is Gordon's position that he shouldn't have to bring this motion simply to have Defendants stop sending Gordon unwanted spam. Under the CAN SPAM Act, if Gordon provides Defendants notice that he no longer wants Defendants to send Gordon spam, that should be the end of it. Defendants are then required to stop sending spam to Gordon. Gordon shouldn't have to file a federal lawsuit, and bring a motion for a permanent injunction, just to be left alone. Nevertheless, the fact remains that Defendants continue to send spam to Gordon, despite the fact that neither Defendants nor this Court can possibly believe that Gordon wants them to continue to send him spam.

In this light, it will be interesting to see if Defendants even contest this motion. One might expect that if Defendants intended to comply with the law, they would either stop sending spam

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to Plaintiff, or they would agree to the entry of an injunction. If they do contest this Motion, the Court should take a keen interest in the motivations that cause Defendants to want to persist in sending spam to Gordon indefinitely into the future. The fact is, Defendants have no legitimate reason, commercial or otherwise, to continue to send Gordon spam. All they have gained from doing so in the past is this lawsuit in Federal Court. Yet despite the fact that Gordon has sued them to get them to stop, Defendants have persisted in sending Gordon spam. One must wonder what possible motivation Defendants could have, beyond a rebellious yearning to openly flout the law, and a malicious desire to continue to harass Gordon.

If Defendants contest this motion, Defendants will undoubtedly argue that at some point in the distant past, through some unknown source, Gordon actually "subscribed" or "opted-in" to receive their spam. This allegation is false (See Gordon Declaration), but even if it were true, it is no longer relevant. The injunction requested by Gordon is prospective in effect, and Defendants are unquestionably on notice now that Gordon doesn't want their spam in the future. Given this request, the CAN SPAM Act clearly provides that they are to stop sending it.

Conclusion

The Court should effectuate the purpose of the CAN SPAM Act, and enter an order that requires Defendants to stop sending spam to Plaintiffs. The Court's failure to do so will send the clear message to Plaintiffs, and others similarly situated, that they have no remedy whatsoever under

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the Federal Can-Spam statute. Such a result would undermine the clear intent of Congress in enacting that law.

RESPECTFULLY SUBMITTED this 14th day of June, 2007.

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Certificate of Service

I, hereby, certify that on June 14, 2007, I filed the attached pleading with this Court via approved electronic filing, and served the following:

Attorneys for Defendants: Derek Newman, Roger Townsend, Newman & Newman.

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